2011 IL App (1st) 091820-U

FIFTH DIVISION
August 26, 2011

No. 1-09-1820

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 10646
	)	
GREGORY JOHNSON,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 HELD: Where trial court ruled evidence of aggravated battery victim's encounter with police was inadmissible to demonstrate victim's violent character, failure to allow that evidence did not constitute plain error given the admitted evidence that victim previously shot at defendant during an argument; defendant's convictions were affirmed and mittimus corrected due to error in sentencing.

¶ 2 Following a bench trial, defendant Gregory Johnson was convicted of three counts of aggravated battery and was sentenced to an extended-term sentence of six years and six months in prison. On appeal, defendant contends the trial court abused its discretion in excluding evidence that the victim previously assaulted two police officers as not probative of the victim's propensity for violence. Defendant, who has completed his sentence, also argues the

mittimus should be corrected to reflect the maximum non-extended sentence of five years in prison. We affirm and order correction of the mittimus.

¶ 3 Defendant's convictions arose from an altercation with Tamarie McBee on May 2, 2007, in which defendant stabbed McBee in the eye with a pocket knife. Each man testified the other instigated the fight. Defendant also was charged with attempted murder and was acquitted on that count.

¶ 4 Before trial, defendant filed a motion *in limine* seeking to introduce evidence of two previous incidents involving McBee to show McBee's propensity toward violence. Defendant sought to introduce a November 2005 altercation in the neighborhood of 16th and Karlov in Chicago during which McBee shot a weapon at defendant and also a December 2004 incident in which McBee was arrested and charged with battery and obstructing a peace officer. Defendant stated in the motion the arresting officers would testify that as they approached McBee to conduct a field interview, McBee pushed one officer and slammed a door on another officer's arm. Defendant argued that evidence supported his position that McBee initiated the attack in the instant crime. After hearing arguments on the motion, the trial court allowed defense counsel to present evidence of the incident involving McBee and defendant but not McBee's encounter with police.

¶ 5 At trial, McBee testified that on May 2, 2007, he was visiting his mother, who lived at 1539 South Karlov. Between 11 p.m. and midnight, McBee was standing outside waiting for a friend, Rex Rand, and Rand's cousin, Duane Croft, to take him home. Defendant approached McBee and they stood "face-to-face" as defendant asked McBee for marijuana.

¶ 6 McBee, who was 29 years old at the time of trial, said he and defendant had known each other since childhood. McBee said defendant "smelled like he was high off PCP" and his breath smelled of alcohol. After Rand and Croft arrived, defendant and McBee started to

argue. McBee testified defendant struck him in the jaw with a closed fist. McBee said he had not touched defendant before defendant struck him. After being hit, McBee pushed defendant to the ground, and defendant got up and ran toward him. McBee said defendant was "swinging real wild."

¶ 7 After the men fought for about 15 minutes, McBee backed away into the street and saw that defendant had a sharp object in his hand. Defendant "charged" at McBee, swinging a knife as McBee backed up against a parked van. Defendant stabbed McBee in the left eye, and "blood started skeeting from everywhere." McBee said his eye was "hanging out." McBee was taken to a hospital and treated for an eye injury and stab wounds on his arms and back. He received a cut from the side of his mouth that extended to the back of his jaw. McBee said he did not have a weapon that night.

¶ 8 On cross-examination, McBee said he drank alcohol on the night defendant attacked him. McBee said he was about 6 feet 3 inches tall and weighed about 275 pounds. He acknowledged he did not call for help or run away after he pushed defendant to the ground. McBee said that in 2005, he and defendant argued about a gun but they were "buddies, friends" several months after that incident.

¶ 9 Croft testified he and Rand arrived to pick up McBee and spoke to another person present. Croft, who had known defendant for 10 years, observed defendant and McBee fighting and said McBee "had his head down" and defendant was punching McBee in the front of his face. McBee had blood on his shirt, and they took McBee to the hospital. Croft identified defendant in a police lineup. Rand gave testimony consistent with that of Croft and McBee. Neither Croft nor Rand saw how the fight started. A pocket knife and a larger kitchen knife were recovered from the vehicle defendant was driving when he was arrested.

¶ 10 Defendant testified he acted in self-defense. He stated he had known McBee for 20 years and described himself as 5 feet 11 inches tall and weighing 228 pounds. Defendant said that in November 2005, McBee shot at him because he had stolen a gun from McBee.

¶ 11 As to the events of May 2, 2007, defendant said he and McBee started talking and McBee "started pointing his hand in [defendant's] face and spitting out of his mouth and arguing, being loud." Defendant said McBee initiated the fight by punching him in the face and knocking him to the ground. Defendant stated that before McBee struck him, McBee positioned his right hand in such a way that he believed McBee was holding a gun; however, defendant admitted he did not see a weapon in defendant's hand during their struggle.

¶ 12 Defendant said after McBee knocked him to the ground, defendant's shirt was pulled over his head and McBee was beating him on the back of the neck. Defendant said at that point, he "got a chance to fight back" and did so because he was "scared." Defendant stopped struggling with McBee after McBee "backed up off me."

¶ 13 Defendant thought McBee was striking him with a hard object but did not see anything in McBee's hands. Defendant pulled out a small knife he kept on his key chain to defend himself. McBee walked away and got into a vehicle. Defendant said the back of his head and his neck were injured and he intended to get medical attention but he was stopped and arrested by police.

¶ 14 On cross-examination, defendant admitted stealing McBee's gun in 2005 but said no police report was filed as to that earlier altercation. As to the instant offense, defendant said McBee spoke to him first and there was no underlying dispute between them at that time. Defendant said although their conversation became heated, he was not upset with McBee. Defendant said he blacked out briefly when he fell to the ground. Defendant decided to use the knife when it fell out of his pocket and said he was "just swinging [the knife] to get [McBee] up

off me." At the close of evidence, the trial court convicted defendant of three counts of aggravated battery. Defendant's motion for a new trial was denied.

¶ 15 On appeal, defendant contends the court committed reversible error in excluding evidence of the 2004 unrelated incident in which McBee used force on two police officers. Defendant argues the proffered evidence that McBee pushed one police officer and slammed a door on another officer's arm "unmistakably shows [McBee's] violent nature" and McBee's "proclivity to start fights" and evidence of that encounter should have been admitted to support defendant's account that McBee was the initial aggressor in the instant offense. He asserts the trial court abused its discretion in excluding the evidence.

¶ 16 Although an abuse of discretion standard of review is appropriate for consideration of an evidentiary ruling, defendant acknowledges on appeal that his counsel failed to include this issue in a post-trial motion, thus warranting application of the plain error doctrine. To preserve an alleged error for review, a defendant must raise a timely objection at trial and also raise the error in a written post-trial motion, and the failure to perform both of these steps ordinarily results in forfeiture of the issue on appeal. *People v. Kitch*, 239 Ill. 2d 452, 460 (2011).

¶ 17 The plain error rule creates a limited exception to forfeiture to protect a defendant's substantial rights and sustain the integrity of the judicial process. *Kitch*, 239 Ill. 2d at 461 (noting the defendant bears the burden of establishing plain error). Under the plain error doctrine, an unpreserved error is reviewed when either (1) the evidence is closely balanced, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Alsup*, 241 Ill. 2d 266, 275-76 (2011).

¶ 18 Defendant invokes the first alternative of plain error, asserting the evidence was closely balanced because the trial court was required to weigh two competing versions of the

altercation. Defendant contends McBee's account of being attacked by defendant was not credible, and the account of McBee's encounter with the police officers therefore was admissible and relevant to show that McBee had a tendency to instigate fights.

¶ 19 The State responds no error occurred in excluding evidence of McBee's encounter with police, and even if this court was to find error, the evidence presented at trial was not closely balanced such that the error could have resulted in defendant's conviction. The closely balanced evidence prong of plain error guards against errors that could lead to the conviction of an innocent person. *People v. Herron*, 215 Ill. 2d 167, 186 (2005).

¶ 20 When a theory of self-defense is raised in a homicide or battery case, evidence of the victim's violent and aggressive character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence. *People v. Lynch*, 104 Ill. 2d 194, 200-01 (1984); *People v. Lovings*, 275 Ill. App. 3d 19, 24 (1995). The supreme court held in *Lynch* that the victim's previous battery convictions were reasonably reliable and competent evidence of a violent character. *Lynch*, 104 Ill. 2d at 201. Evidence of a victim's violent character may be offered in two circumstances: (1) to demonstrate that the defendant's knowledge of the victim's violent tendencies affected the defendant's perceptions of and reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened, even if the defendant had no prior knowledge of the victim's violent acts. *Lynch*, 104 Ill. 2d at 199-200; *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008). In the second instance, the victim's character is circumstantial evidence that provides the trier of fact with additional facts to decide what happened. *People v. Bedoya*, 288 Ill. App. 3d 226, 236 (1997) (citing *Lynch*).

¶ 21 The essence of defendant's appeal is that although the prior incident in which McBee shot at him showed McBee's violent tendencies toward him specifically and the trial

court admitted that evidence, the December 2004 arrest was also relevant under the second *Lynch* alternative to demonstrate McBee's general propensity to initiate violence. A prior altercation or arrest, short of an actual conviction, has been deemed adequate proof of a victim's violent character when it is supported by firsthand testimony as to the victim's behavior. *People v. Cook*, 352 Ill. App. 3d 108, 128 (2004). But see *People v. Ellis*, 187 Ill. App. 3d 295, 301 (1989) ("evidence of a victim's mere arrest is inadmissible since it does not indicate whether the victim actually performed any of the acts charged," and court did not abuse discretion in excluding evidence of victim's prior arrest).

¶ 22 Here, the court admitted relevant evidence to support defendant's account that McBee was the aggressor, namely that McBee shot a weapon at defendant during a disagreement about 18 months before the instant crime. Evidence of that shooting by McBee provided the trial court with proof of McBee's violent tendencies toward defendant.

¶ 23 Defendant argues McBee's encounter with police was not cumulative of the admitted evidence and that the admission of some evidence of an victim's propensity toward violence does not mitigate the improper exclusion of additional proof of a violent character, citing *People v. Davidson*, 235 Ill. App. 3d 605, 610 (1992). In *Davidson*, although the court granted a new trial based on a number of errors, the court specifically stated the trial court's "unduly narrow" evidentiary ruling alone did not deprive the defendant of a fair trial. *Davidson*, 235 Ill. App. 3d at 610. Here, even assuming *arguendo* the trial court erred in excluding evidence of McBee's encounter with police, the absence of that evidence did not affect the outcome of defendant's case in light of the evidence admitted.

¶ 24 The remaining issue on appeal involves sentencing. Defendant has filed a supplemental brief to this court challenging his extended-term sentence of six years and six months in prison as void. Defendant was convicted of three counts of aggravated battery, and the

trial court merged the counts and sentenced defendant on one count of aggravated battery, a Class 3 felony, pursuant to section 12-4(a) of the Criminal Code of 1961 (720 ILCS 5/12-4(a) (West 2006)).

¶ 25 At sentencing, the trial court was mistakenly informed that defendant had prior felony convictions that were Class 3 felonies or greater, which supported an extended-term sentence pursuant to section 5-5-3.2(b)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b)(1) (West 2006)). That section permits an extended-term sentence if a defendant is convicted of any felony having been previously convicted of the same or similar class felony or greater class felony within 10 years and the charges arose from different series of acts. 730 ILCS 5/5-5-3.2(b)(1) (West 2006). Based upon the incorrect characterizations of defendant's prior convictions, defendant was sentenced to an extended term of six years and six months in prison. 730 ILCS 5/5-8-2(a)(5) (West 2006) (extended-term sentencing range for Class 3 felony is 5 to 10 years in prison).

¶ 26 Defendant now contends, and the State correctly agrees, that defendant's prior convictions did not support an extended-term sentence because those convictions were for Class 4 felonies, which are not in the same or similar class or greater class as the underlying Class 3 felony as required by section 5-5-3.2(b)(1). Defendant therefore was only eligible for a non-extended term sentence in the range of two to five years in prison. 730 ILCS 5/5-8-1(a)(6) (West 2006) (sentencing range for Class 3 felony). Because defendant has now completed his prison sentence, he asks that the mittimus be corrected to reflect the maximum non-extended sentence of five years in prison. Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999)), we direct the clerk of the circuit court to correct the mittimus to indicate that defendant was sentenced to a non-extended term of five years in prison.

¶ 27 Accordingly, the circuit court's judgment is affirmed in all respects, and the clerk is instructed to correct the mittimus.

¶ 28 Affirmed; mittimus corrected.